

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BUCHERER, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1979	:	
through February 28, 1983.	:	

DETERMINATION

In the Matter of the Petition	:
of	:
WILLIAM SERGIO CORTI	:
for Revision of a Determination or for Refund	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law for the Period December 1, 1979	:
through February 28, 1983.	:

Petitioner Bucherer, Inc. c/o Graubard, Moskovitz, McGoldrick, Dannett & Horowitz, 600 Third Avenue, New York, New York 10016, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through February 28, 1983 (File No. 800759).

Petitioner William Sergio Corti, c/o Graubard, Moskovitz, McGoldrick, Dannett & Horowitz, 600 Third Avenue, New York, New York 10016, as an officer of Bucherer, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through February 28, 1983 (File No. 800758).

A hearing was held before Nigel S. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 24, 1988 at 9:15 A.M., with all briefs submitted by July 8, 1988. Petitioners appeared by Graubard, Moskovitz, McGoldrick, Dannett & Horowitz (Allen Greenberg, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether sales of goods (jewelry) in New York are taxable where the goods are delivered in a packaged state to the customer in New York and are not unpackaged by him until after he has boarded an international air flight.

II. Whether sales to diplomatic personnel are taxable in the absence of a sales tax exemption certificate.

III. Whether the New York State Sales Tax Law that taxes items of tangible personal property sold to nonresidents who take possession of property in New York, but exempts nonresidents who take possession of a motor vehicle in New York, violates the Equal Protection Clause of the New York State and United States Constitutions.

IV. Whether petitioner William Sergio Corti is, under section 1131(1) of the Tax Law, an officer of Bucherer, Inc. and as such under a duty to act for such corporation in complying with Article 28 so that he is liable for such tax under the provisions of section 1133(a) of the Tax Law.

FINDINGS OF FACT

1. (a) Petitioner Bucherer, Inc. ("Bucherer") is a retail jeweler located at 730 Fifth Avenue, New York, New York. Bucherer went out of business on January 31, 1983.

(b) Mr. "W.S. Corti" was named as Bucherer's sole officer on its 1979, 1980 and 1981 Federal corporation income tax returns.

Mr. William S. Corti signed the audit method election for Bucherer, designating himself managing director and vice president. Mr. Corti's signature also appears on Bucherer's sales tax returns. Mr. Corti now resides in Switzerland.

2. The books and records of Bucherer were found to be adequate for conducting a detailed audit. However, in lieu of an audit utilizing all books and records, Bucherer and the Department of Taxation and Finance signed an "audit method election" (form AU 377.12) by which Bucherer elected "utilization of a representative test period audit method to determine any sales or use tax liability." This election extended to sales and recurring expense purchases but not to fixed asset acquisitions. This election states explicitly that it does not preclude the protest of the audit results.

3. Bucherer's gross sales for 1980 and 1981 as reported on its sales tax returns were less (by \$114,799.20) than the sales reported on its Federal corporation tax returns for both years. No explanation for this discrepancy was forthcoming. The difference resulted in an additional tax due of \$9,380.51.

4. Bucherer's reported nontaxable sales were tested for a one-month test period of November 1980. A schedule was prepared showing each sale, its billing address, its shipping address, its amount and the finding of the auditor. About 46% of the reported nontaxable sales were disallowed. Reasons for disallowance assigned by the auditor were that the merchandise was hand carried from the store by the customer allegedly for later export, or the sale was to a foreign diplomat from whom Bucherer failed to obtain a sales tax diplomatic exemption certificate (ST 126). The 46% figure was applied to reported nontaxable sales for the entire audit period to arrive at additional taxable sales of \$2,490,667.62 and tax due thereon of \$201,772.05.

5. A test was made of taxable expense purchases for the months of September and October 1980. Items representing advertising and display materials were found to be taxable and were itemized in worksheets. An error factor of .311648 was computed and was applied to total expense purchases for the audit period. This resulted in additional tax of \$22,624.55.

6. The auditor found purchases of fixed assets subject to tax in two of the quarters. These purchases were for leasehold improvements such as carpets and cabinets and were listed in a

schedule. The tax due on these purchases amounted to \$4,209.14.

7. (a) The auditor disallowed certain credits taken by petitioner on its sales tax returns. These credits were for refunds of tax to foreign customers who had paid sales tax when taking delivery in New York City, traveled to a foreign country and from there mailed to Bucherer a form letter requesting a refund. The amount of credits disallowed was \$16,165.85.

(b) The refund form was on the letterhead of Bucherer and was captioned with the name of the customer and date. It designated a portion to be signed by an airline employee. This portion certified that the identified passenger on the identified flight showed the employee one sealed package which the passenger had carried aboard the aircraft, marked as follows: "BUCHERER INCORPORATED 730 Fifth Avenue, New York, NY 10019"; that the wrapping of said package was undisturbed and sealed; that said passenger opened the package in the employee's presence and outside the territorial limits of the United States of America; and that said package contained a certain sales slip number purporting to be from Bucherer and describing the contents of the package. The bottom part of the form contained a passage to be signed by the passenger. This stated: "I hereby certify that I am the passenger named above; that I have purchased the above described article(s) from Bucherer Inc. who packed the above mentioned articles in the above described manner and I opened the package for the first time in the afore said [sic], outside the territorial limits of the United States of America, and that said article has not been used within the United State of America. I am not a citizen of the United States of America."

8. (a) The corporation, by Mr. Corti, executed a consent extending the period of limitations for assessment of sales and use taxes for the period December 1, 1979 through May 31, 1980 to September 20, 1983.

(b) On September 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Bucherer, Inc. in the amount of \$254,152.10, (\$227,318.41 in sales tax and \$26,833.69 in use tax), plus interest of \$54,591.25, for a total due of \$308,743.35 for the period December 1, 1979 through February 28, 1983.

(c) On the same date, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due¹ against petitioner William Sergio Corti, vice president, for personal liability as an officer, in the amount of \$227,318.41, plus interest of \$48,889.91, for a total due of \$276,208.32 for the identical periods covered by the notice to the corporation. Mr. Corti's notice did not include the use taxes assessed against the corporation.

CONCLUSIONS OF LAW

A. The Audit Division properly denied credits taken by petitioner for refunds paid, and properly disallowed claimed nontaxable sales, to customers who had traveled abroad. The fact that the goods were packaged and only opened after they had left the United States is irrelevant so long as the package was delivered to the customer in the United States and in New York State. The procedure and the very elaborate form letter used by petitioner were apparently designed to show that the goods were in the process of being exported so as to qualify as free from taxes by

¹Although a notice of determination under Tax Law § 1138(a) should have been issued against Mr. Corti, all of the notice requirements of section 1138(a) were complied with on the notice and demand issued.

reason of Article I, § 10(2) of the US Constitution which states that "No State shall...lay any Imposts or Duties on Imports or Exports...." At one time this had been interpreted by the U.S. Supreme Court to bar a state sales tax on the sale of goods if the goods had already entered the "export stream" to the foreign country (see Richfield Oil Corp. v. State Board and Equalization, 329 US 69). Whether Bucherer's procedure is adequate to ensure that its goods were being exported so as to be within the meaning of that test is doubtful, however, since the sale by Bucherer was clearly made at the time the purchaser took possession of the package in New York. However, that is now academic. The U.S. Supreme Court has reconsidered and redefined the meaning of this provision of the Constitution. Now the focus of any controversy is not on the goods being exported but rather on the nature of the tax being applied. The tax involved will not be a prohibited "import or duty" on an export so long as it does not disrupt United States foreign policy and if it is not found to cause friction and erect trade barriers between the states (Department of Revenue v. Assn. of Washington Stevedoring Cos., 435 US 734). In the instant case, the New York tax involved is a general sales tax applicable to all sales in New York generally, whether the goods will be later used in New York, in another state or in a foreign country. It would appear to be valid under the constitutional provision and, in fact, the New York State Tax Appeals Tribunal has so held (Matter of David Hazan, Inc., Tax Appeals Tribunal, April 21, 1988; see Continental Arms Corp. v. State Tax Commn., 130 AD2d 929, lv granted 71 NY2d 802). General sales taxes in other states have also been held valid in similar cases (see, e.g., Arizona Dept. of Revenue v. Robinson's Hardware, 149 Ariz 589).

B. The sales made to persons who claimed to be diplomatic personnel must be held to be taxable. Since the inception of the sales and use tax in 1965 the Department of Taxation and Finance has provided for exemptions for diplomatic and consular personnel where it is appropriate because of a treaty with the respective country which covers the person in question. To accomplish this New York has, prior to 1985 and during the years here in question, issued to qualified persons identification cards, "DTF-10", each of which has an identification number. It also provided a certificate of tax exemption, "ST-126", to be presented by the purchaser to the vendor, which required the enclosure of the purchaser's identification number. In 1982 those requirements were included in regulation 20 NYCRR former 529.6. In any event at all times these documents have been necessary in New York for diplomatic personnel to purchase goods free of the sales and use tax. Sales to diplomatic personnel where such documents have not been produced have been held taxable (Matter of Jerry's Kiddie Dashary, Inc., State Tax Commission, April 6, 1987).

C. The application of the sales tax to general merchandise merely delivered to the purchaser in New York is valid despite the different treatment of automobiles. This is not a violation of the equal protection of the laws. A state may tax different types of goods in different ways and in fact may exempt some goods while taxing others. This discretion is very broad (Bell's Gap R.R. v. Pennsylvania, 134 US 232, 237; Madden v. Kentucky, 309 US 83, 87-88; New York Rapid Transit Corp. v. City of New York, 303 US 573, 578). In particular, motor vehicles have been validly treated differently for purposes of both property taxes and sales taxes (71 Am Jur 2d, State and Local Taxation, § 189; 68 Am Jur 2d, Sales and Use Taxes, § 28). In New York the sales tax will be applied so as to exempt nonresidents who will not be using the vehicle in a business in New York (Tax Law § 1117). The tax is enforced at the time of registration in New York of the vehicle (Tax Law § 1132[f]). A similar special treatment for motor vehicles is provided, apparently without question, in many states (see generally Due, State and Local Sales Taxation, at 7).

D. Mr. Corti is an officer of Bucherer, Inc. No evidence has been presented in this case to show that he was not under a duty to act for Bucherer in complying with Article 28. He is

therefore liable under Tax Law § 1133(a) for the sales taxes of Bucherer, Inc.

E. The petitions of Bucherer, Inc. and William Sergio Corti are denied and the notices of determination and demands for payment of sales and use taxes due are sustained.

DATED: Albany, New York
September 22, 1988

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE